



DEBRA BOWEN | SECRETARY OF STATE | STATE OF CALIFORNIA

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October 17, 2008

Office of Administrative Law
Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Re: Proposed Emergency Regulations (2008-1009-02E)

Dear OAL Research Attorney:

Secretary of State Debra Bowen submits this letter to respond to the comments and objections to the above-captioned proposed emergency regulations. Comments and objections opposed to the proposed emergency regulations were filed by the Counties of San Diego, Tulare, Kern and Butte and their respective Registrars of Voters and by Mr. Stephen N. Trout of Election Solution Providers.

An Emergency Exists

The President of the United States has more power over the lives of Californians than any other elected official. Election of the President occurs only once every four years. The next presidential election will be held on November 4, 2008, now less than three weeks away. The number of citizens participating in the election is expected to reach historic levels.

Public confidence in election results is essential to the legitimacy of our system of government, not only with respect to the presidency but also the many other contests on the same ballot, from federal, state and local offices to state and local ballot measures affecting major public policy and fiscal issues.

In a national Gallup Poll in December 2000, 67% of respondents said they had little or no confidence in the nation's vote counting. Six years later, public confidence had not been fully restored. In September 2006, 12% of registered voters in a national AP/Ipsos Poll said they were not too confident or not at all confident that their votes would be counted accurately. More troubling, there was a marked contrast in opinions depending on the race of the respondent. Among white respondents, 63% said they were very confident their votes would be counted accurately and only 8% that they were not too confident or not at all confident. Among black respondents, only 30% reported they were very confident their votes would be counted accurately, while 29% said they were not too confident or not at all confident. See <http://pewresearch.org/pubs/87/public-concern-about-the-vote-count-and-uncertainty-about-electronic-voting-machines>.

Here in California, a Field Poll in August 2007 found that only 44% of likely voters reported having a great deal of confidence in the vote count while 14% (1 in 7) said they had little or no confidence their votes were being tabulated correctly. Voters who were not registered with any political party reported the greatest concern, with 22% (more than 1 in 5) having little or no confidence that votes were being properly tallied. See <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/08/23/BAB0RNAO8.DTL>.

These dry statistics represent millions of California voters who have grave doubts about the trustworthiness of our elections. For purposes of the Administrative Procedure Act (APA), "emergency" is defined as "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare." Gov. Code § 11342.545. Permitting elections to continue to be held without taking steps to increase confidence among those millions of voters would risk serious harm to the public general welfare. An emergency exists, and the proposed emergency regulations are necessary to avoid that serious harm.

When she issued the Post Election Manual Tally Requirements (PEMT Requirements) in October 2007, the Secretary of State reasonably believed she had direct authority for her action under her exclusive statutory power over the approval and withdrawal of approval for use of electronic voting systems in the state. The Secretary acted only after months of extensive research and expert consultation that revealed the vulnerability of electronic voting systems to error and tampering, and the value of enhanced post election manual tallies to ensure the integrity and accuracy of results produced by those systems in close contests. The Secretary reasonably believed the PEMT Requirements were valid and not subject to the requirements of the APA. Indeed, the Superior Court in San Diego County entered judgment to that effect on March 7, 2008, rejecting a challenge brought by San Diego County, one of the parties that filed objections to the proposed emergency regulations.

In the June 2008 Statewide Primary Election, the PEMT Requirements were successfully implemented by local elections officials in the seven counties where contests with initial margins of victory smaller than 0.5% called for manual tallies of those contests in 10% of the precincts. The other 51 counties were prepared, but not called upon, to conduct such tallies, because they had no margins of victory below the 0.5% threshold.

The situation did not change until August 29, 2008, when the Court of Appeal issued its decision in the case challenging the PEMT Requirements. See *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501. The decision upheld the Secretary's authority to require post election manual tallies as part of her power to approve and withdraw approval for voting systems. The court also ruled, however, that the Secretary could adopt the PEMT Requirements only through the APA process. The Secretary of State respectfully disagrees with the latter ruling, and has petitioned the California Supreme Court to grant review on that issue.

In the interim, however, the Secretary recognized the vital importance of ensuring the accuracy—and public confidence in the accuracy—of results in any contests on the November 4, 2008, ballot with very narrow margins of apparent victory. By August 29, 2008, it was too late to complete the lengthy APA process for approval and implementation of permanent regulations in time for the election on November 4, 2008. For this reason, the Secretary of State decided it was necessary to take action under the emergency regulatory provisions of the APA. Without changing their operation or effect, the PEMT Requirements were re-structured into the format of formal regulations and submitted to the Office of Administrative Law on October 9, 2008.

The Post Election Manual Tally Regulations Are Necessary to Address the Emergency

Fair and accurate elections in which every eligible voter's ballot is counted as it was cast are the foundation of our representative democracy. Numerous scientific studies have proven that electronic voting poses serious new threats to the integrity and accuracy of election results. Electronic voting systems pose a qualitatively different and more serious risk of tampering than prior voting technologies, because it is possible for a single individual or handful of individuals to control the operation of thousands of voting devices by gaining brief access to just one of the devices. Worse, such tampering can be extremely difficult or impossible to detect or prove. Other government-funded studies have reinforced the findings to this effect found in Secretary of State Bowen's Top-To-Bottom Review, citing in the Finding of Emergency. See, e.g., Project EVEREST (Evaluation & Validation of Election-Related Equipment, Standards, & Testing), Risk Assessment Study of Ohio Voting Systems Executive Report, Ohio Secretary of State Jennifer Brunner, December 14, 2007, available at <http://www.sos.state.oh.us/elections.aspx>. Both Congress and the California Legislature have recognized the risks of electronic voting, enacting requirements for accuracy and security. See the Help America Vote Act of 2002 § 301(a)(5), 42 U.S.C. 15481(a)(5) ; Elec. Code § 19250.

Electronic voting systems, with their complex software code and sensitive hardware components, are also prone to errors and inaccuracies even in the absence of malicious tampering. Hundreds of serious incidents have been documented nationwide, including here in California. (See examples provided on page 5 below.)

Election procedures and administrative "checks and balances" before, during and after elections are an important means of mitigating these risks. Indeed, the elections officials from the same counties that have objected to the proposed emergency regulations have argued that such processes are essential. Post election manual tallies are one such check on the trustworthiness and accuracy of results and one that research shows is particularly effective.

Increased Percentage Manual Audits Are Necessary to Ensure the Integrity and Accuracy of Results in Close Contests

Several comments assert that the 1% post election manual tally, required by Elections Code § 15360 is sufficient to ensure voting system integrity and accuracy. For example, the Butte County Registrar of Voters makes the following three, unsupported assertions:

The 1% manual tally that has been in Election (sic) Code section 15360 for years has provided the check necessary to guarantee accurate and secure results. There is no evidence anywhere in this state where ballots have been miscounted or counting machines have been compromised. There is academic research which shows that not only is a 1% manual audit sufficient to ensure the accuracy of election results, but it also says that anything more than 1% provides not additional safeguards.

San Diego County and its Registrar of Voters make similar unsupported claims:

All counties in the state already perform a legislatively required 1% manual tally of randomly selected precincts after each election (Elec. Code § 15360) and there is no evidence that the 1% manual tally is inadequate or that a 10% manual tally is more likely to determine if a voting system has been tampered with.

In fact, as shown below, there is clear evidence that the 1% manual tally is not adequate, particularly in contests with very narrow margins of victory; that the 10% manual tally called for in the emergency regulations is more likely to ensure the accuracy of the results and determine if a voting system has been tampered with, and that ballots have been miscounted and counting machines have been compromised in many California counties.

In 2007, the Secretary of State convened the Post Election Audit Standards Working Group. The Working Group included a computer scientist from the Lawrence Livermore National Laboratory who is an expert on voting systems; a county registrar of voters; a city clerk responsible for conducting elections in her city; the President of the respected California Voters Foundation; a Certified Public Accountant; and a Professor of Statistics at the University of California, Berkeley. After reviewing the scientific literature in the field and interviewing dozens of elections officials and other experts, the Working Group reached the following general conclusions:

- o The larger the random sample, the more likely it is that human and voting system errors will be detected.
- o Close races require larger random samples to determine whether errors could overturn election results.
- o Races involving a small number of precincts require a larger percentage random sample to determine whether errors could overturn election results.

The Working Group found specifically that the 1% manual tally provided for in Elections Code § 15360 was inadequate to detect many errors or fraud that could alter the outcome in a close contest:

As a result of the increasing sophistication of voting systems, the current flat 1% percent manual count is no longer sufficient for confirming election results and checking voting system accuracy and reliability. (Page 5.)

The Secretary's PEMT Requirements (and the proposed emergency regulations) followed closely the following recommendations in the Working Group's report, which is cited in the Finding of Emergency submitted to OAL on October 9, 2008:

The Working Group recommends that the Secretary of State develop a comprehensive approach to verifying election outcomes. Such an approach would involve a hand count of a minimum percentage of precincts for all races, and more precincts for close races and races involving only a small number of precincts. The approach would specify an initial sample size and how the sample should be expanded if discrepancies are found. Ultimately the approach must be able to determine whether the outcome of each race is in doubt, given the discrepancies found by the hand count.

Numerous expert statistical studies demonstrating the benefits of 10% manual tallies in ensuring the correctness of the outcome in close races are presented in the 2007 report by the Brennan Center for Justice, "Post Election Audits: Restoring Trust in Elections," available at http://www.brennancenter.org/content/section/category/voting_technology.

Finally, there is clear evidence that ballots have been miscounted by electronic voting systems in California elections and that thousands of the state's vote counting machines have been compromised.

Weeks after the March 2004 Statewide Primary Election, local officials discovered that votes were miscounted by a Diebold electronic voting system. In this instance, 2,821 absentee ballots cast for Democratic presidential hopeful John Kerry were actually counted for Dick Gephardt. In a Senate race on the same ballot, 68 votes for one candidate and six votes for another were credited to a third candidate. The error may have been caused by multiple scanners feeding data into the tabulation system at once. See Brennan Center for Justice, "Post Election Audits: Restoring Trust in Elections," Appendix A, page 48. Five months earlier, the same system switched thousands of Democratic absentee votes in the election to replace recalled Governor Davis to an obscure Southern California socialist candidate. See Ian Hoffman, "County's vote-counting snafu crops up in San Diego," April 9, 2004, available at http://findarticles.com/p/articles/mi_qn4176/is_/ai_n14573856.

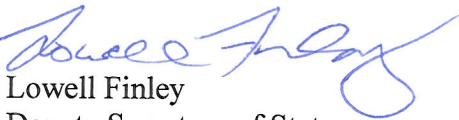
As for evidence that vote counting machines have been compromised, a December 15, 2003, field audit report prepared for the Secretary of State by R&G Associates, LLC, found that Diebold had provided and multiple counties had used versions of Diebold voting system software that lacked federal certification, California approval, or both. Sale and use of this uncertified software violated California law, as it had not been fully examined or tested to determine whether it functioned properly or whether it contained viruses or other malware that could affect the outcome of elections.

Conclusion

An emergency exists in the form of proven risks that electronic voting systems will produce inaccurate results as a result of defects or tampering. Knowledge of those risks has produced deep distrust in the way our votes are counted among millions of California voters. Routine 1% manual tallies are insufficient to detect many such problems, particularly where there is a risk due to narrow margins of victory that the initial results falsely identify the losing candidate as the winner or indicate that a ballot measure has passed when in fact it received an insufficient number of votes, or failed when in fact it received sufficient votes to pass. Increased 10% manual tallies in contests with initial margins of victory under 0.5%, as required in the proposed emergency regulations, are necessary to provide a high level of confidence that the final results are correct, whether by confirming the initial count or by revealing and correcting errors. The Secretary of State reasonably believed that the APA did not apply until a court decision holding that it did was rendered too close to Election Day to employ the permanent regulation.

For all these reasons and the reasons stated in the Finding of Emergency, the Secretary of State requests that OAL approve the emergency regulations.

Sincerely,



Lowell Finley
Deputy Secretary of State
Voting Systems Technology and Policy